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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

No._____

SEATTLE SCHOOL DISTRICT NO. 1, et al.

Appellees,

v.

STATE OF WASHINGTON, et al.,

Appellants.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

This appeal raises significant new questions about the extent to which the Fourteenth Amendment inhibits state action when racial distribution of students in public schools is involved. Principal among them is the following question which was alluded to, but not answered, by this Court in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977):[1]

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[1] *I.e.*, the constitutionality of actions designed to "* * * undo operative regulations affecting the assignment of pupils * * *" *Dayton, supra*, at page 413. This case involves just such a state statute. In *Dayton*, however, this Court went on to say, at page 413:

"* * * We agree with the Court of Appeals' treatment of

I.

Absent any constitutional duty on the part of a local school board to implement a racially-oriented mandatory bussing program, once such a program is underway, may it ever be discontinued without violating the Fourteenth Amendment?

The remaining questions presented by this appeal are:

II.

Once a racially-oriented mandatory bussing program has begun in a non-segregated school district, may the pre-existing racially-neutral neighborhood school assignment policy only be restored by the local school board which abandoned it, or may it be restored by the superior legislative authority of the state through enactment of a law applicable to all local school districts?

III.

Does a state statute which does not explicitly use race as a criterion nevertheless create an impermissible racial classification solely because it addresses specifically a subject which has a racial nexus?

IV.

Does statutory restoration of a neighborhood school assignment policy constitute racially discriminatory state action when accomplished in response to a mandatory bussing program designed to achieve a particular level of racial distribution of public school students deemed to be desirable by a local school board?

[the Board's] action, wherein that court said:

" 'The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action it initially took * * * If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. * * *' Brinkman v. Gilligan, 503 F2d 684, 697 (1974)."

V.

Where record evidence shows nondiscriminatory intent on the part of voters adopting a state-wide initiative, does a district court err by finding that the legislation was motivated by an intent to discriminate on racial grounds while refusing even to consider such evidence?

VI.

Where a state statute is modeled closely on a federal statute explicitly intended to foster a national policy in favor of neighborhood school assignment of public school students and to inhibit the use of mandatory bussing to achieve racial distribution in public schools, is there a recognized constitutional ground for upholding the federal law while striking down the state law?

VII.

Where state officials involved in implementing a state law interpret it in a manner which eliminates a particular constitutional inquiry, it is error for a federal court to interpret that law in a contrary manner, rendering it constitutionally suspect?

VIII.

(A) Are political subdivisions of a state, such as school districts, within the ambit of 20 U.S.C. § 3205 and 42 U.S.C. § 1988, so as to entitle them to attorneys' fees when they prevail in suits against the state?

(B) If political subdivisions are so entitled, does a district court abuse its discretion under those statutes by refusing to order a state to pay the attorneys' fees of school district plaintiffs upon a finding that the district's prosecution of the litigation has already been funded by that state?

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PARTIES TO THESE PROCEEDINGS

All original and substituted parties to these proceedings, other than intervenors, are listed in the Notice of Appeal to this Court which is reprinted as Appendix D. The intervenor parties are listed in the footnote below.[2]

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Memorandum Opinion of the U.S. District Court for the Western District of Washington, entered on June 15, 1979,

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[2]The "Seattle intervening plaintiffs" are the following:

American Civil Liberties Union, American Friends Service Committee; Church Council of Greater Seattle; Loren Miller Bar Association; Seattle Branch, National Association for the Advancement of Colored People; Seattle Urban League; Seattle Chapter of the American Jewish Committee; Ann and Paul Siqueland, individually and as parents and guardians ad litem for Nadine Siqueland, Michele Siqueland and Bruce Siqueland; Constance and Roger Proctor, individually and as parents and guardians ad litem for Kendra Proctor; Samuel and Haruko Shoji, individually and as parents and guardians ad litem for Jay Michael Shoji and Brian Thomas Shoji; Roberto and Marie Esther Gallegos, individually and as parents and guardians ad litem for Roberto P. Gallegos; Lembhard and Patricia Howell, individually and as parents and guardians ad litem for Helen Howell and Elizabeth Howell; Daniel and Sara Levant, individually and as parents and guardians ad litem for David Levant; Gary and Linda Higashi, individually and as parents and guardians ad litem for Jeffrey Higashi, Andrew Higashi, and Julie Higashi; Paul and Cecilia Layton, individually and as parents and guardians ad litem for Brian Layton; Dr. Bill and Ellen Hazzard, individually and as parents and guardians ad litem for Russell Hazzard and Daniel Hazzard; Oscar Conyears, individually and as parent and guardian ad litem for Tandra Conyears; Tyra Elliott, individually and as parent and guardian ad litem for Jai Elliott.

The "Pasco intervening plaintiffs" are the following:

East Pasco Neighborhood Council; Thelma Brown; Mrs. McClendon; Leon Henderson and Ruby Henderson; Jesus Mendez Diaz; Jose Tovar and Elia Tovar; Joaquin Angie Nunes; Refugio Madrigal and Demetria Madrigal; Abel Torres and Guadalupe Torres; Antonio Mendez and Ramona Mendez; Alejo Velasquez and Maria Velasquez; Inosencio Galvez and Natalia Galvez; Manual Zamora and Linda Zamora; and Angel Galvez and Guadulepe Galvez.

In addition, the United States was allowed to intervene as a party plaintiff and CiVIC (Citizens for Voluntary Integration Committee) was allowed to intervene as an additional defendant.

are reported at 473 F. Supp. 996. The December 16, 1980 opinion of a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit is reported at 633 F.2d 1338. These opinions comprise Appendices A and B to this Jurisdictional Statement.

JURISDICTION

This appeal is taken from a Judgment of the Court of Appeals for the Ninth Circuit holding a state statute, Initiative 350 (now codified as chapter 28A.26 RCW), invalid as repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Ninth Circuit affirmed a judgment of the United States District Court for the Western District of Washington holding the act invalid, but largely reversed a separate order of the district court denying attorneys' fees to the plaintiff school district and intervenors.

The state defendants appealed to the Ninth Circuit on September 19, 1979. This was followed by cross-appeals of the district court's denial of several petitions for awards of attorneys' fees. These were consolidated, briefed and argued to a three-judge panel of the Ninth Circuit on June 30, 1980. On December 16, 1980, the Ninth Circuit filed its majority and dissenting opinions.

The state defendants thereafter filed a Petition for Rehearing and Suggestion for En Banc Determination which was denied by order filed on March 26, 1981. A copy of that order is Appendix E. Appeal is now taken to this Court pursuant to 28 U.S.C. § 1254(2). A copy of the Notice of Appeal filed with the Clerk of the Ninth Circuit on May 18, 1981, is Appendix D to this Jurisdictional Statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[3]

United States Constitution, Fourteenth Amendment (Equal Protection Clause).

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[3]These constitutional and statutory provisions are set out in Appendix F.

Washington State Constitution, Article IX.

Initiative Measure No. 350 (now codified as chapter 28A.26, Revised Code of Washington).

20 U.S.C. § 1701, *et seq.* (Equal Educational Opportunities Act of 1974).

42 U.S.C. § 1988 (1976 Civil Rights Attorneys' Fees Award Act).

20 U.S.C. § 3205 (Allowing awards of attorneys' fees in certain educational cases).

STATEMENT OF THE CASE

1. The Statute.

Initiative 350 provides in Section One (now codified as RCW 28A.26.010) that:

> "* * * no * * * school district * * * shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence * * *"

Several exceptions are then carved out of its central policy, however, allowing extra-neighborhood assignment in the following instances:

> " * * *
>
> "(1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;
>
> "(2) If there are health or safety hzards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's place of residence and the nearest or next nearest school; or
>
> "(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities."

One important additional exception is embodied in Section Six (RCW 28A.26.060) as follows:

> "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools."

From the outset of the litigation, the State has interpreted the foregoing provision to allow Washington school districts to assign students away from their neighborhood schools where the state or federal constitution requires them to do so.

Aside from this express subordination of its central policy to constitutional imperatives, though, there is no doubt that Initiative 350 was tailored, in major part, to deal with large-scale, racially-oriented mandatory bussing programs. This legislative specificity highlights the importance of Questions III and IV, page ii, *supra*.

2. **Factual Background.**

Since its admission to the Union in 1889, the State of Washington has operated a unitary public school system in which all children are afforded equal educational opportunity.[4] So far as is known, no Washington school district has ever been judicially declared to have committed a single act of intentional racial segregation in violation of the Fourteenth Amendment in the operation of public schools. And during the past 30 years or so, the state legislature has enacted a comprehensive set of statutes designed to protect and enhance the exercise of civil rights by all persons within the state.[5]

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[4]The Washington Constitution, since its adoption in 1889, has always provided in Article IX, § 1 that,

> "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, *without distinction or preference on account of race, color, caste, or sex*." (Emphasis supplied)

[5]Beginning five years before this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Washington legislature began constructing a comprehensive scheme of civil rights law. The many statutory provisions enacted to protect against racial discrimination include: RCW 9.91.010 (making it a misdemeanor to deny the full enjoyment of any public facilities by acts "directly or indirectly" causing persons of any race to be treated as not welcome); RCW 18.85.230 (prohibiting discrimination in hiring or sales activity by real estate workers and salesmen); RCW 28A.02.050 (prohibiting discrimination by

Against this historical backdrop, in early 1977, the Seattle School Board established certain criteria by which it was thereafter to be determined whether or not a given school within the Seattle School District was "racially imbalanced." Racial imbalance was defined, by board resolution, as:

> "* * * the situation that exists when the combined minority student enrollment in a school exceeds the District-wide combined minority average by 20 percentage points, provided that the single minority enrollment * * * of no school will exceed 50 percent of the student body." (Exhibit 9)[6]

Having adopted this standard, the board then set about implementing a mandatory bussing program which would ultimately eliminate any racial distribution of students in Seattle schools which did not conform thereto. (Exhibits 7, 10-20) It held a series of hearings on the proposed program during which parents of public school students—both majority and minority—expressed repeated opposition and urged the board, instead, to preserve neighborhood schools (Transcript pp. 145-47). Local press accounts at that time indicated that roughly two-thirds of minorities polled in the Seattle area opposed a mandatory bussing program. (Exhibit A-137)

When the final version of the program was settled upon and scheduled to take effect at the beginning of the

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any school district in employment); RCW 35.80.040 and RCW 35.81.170 (prohibiting discrimination in "urban renewal" projects); RCW 41.14.180 (prohibiting discrimination in appointments and promotions in county sheriff's offices); RCW 43.01.100 (prohibiting questions relative to any applicant's race on any application for employment in state government); chapter 49.04 RCW (providing for affirmative action improving minority race representation in trade apprenticeships). RCW 49.60.176 (prohibiting racial discrimination in credit transactions); RCW 49.60.178 (prohibiting racial discrimination in insurance transactions); RCW 49.60.180 (prohibiting racial discrimination in labor union practices); RCW 49.60.200 (prohibiting racial discrimination in employment agency practices); RCW 49.60.215 (prohibiting racial discrimination in amusement); and RCW 49.60.222 (prohibiting racial discrimination in real estate transactions).

[6]Nothing in the record indicates that this particular formula is educationally more beneficial than the myriad of others which might have been chosen.

1978-79 school year, opponents attempted, without success, to seek relief from the state courts. (Findings of Fact 7.1, 7.2.) When they failed in that effort, they took the only course remaining open to them. They drafted, properly filed and thereafter campaigned for adoption of Initiative 350 at the November, 1978 General Election.

This time they succeeded and the initiative was approved by the voters in each of the state's 39 counties. The Seattle School District, joined by the Tacoma and Pasco School Districts, then commenced this litigation.

On February 9, 1979, after hearing, the district court entered a preliminary injunction and, at the same time, allowed intervention by parties. The complaints in intervention alleged that, regardless of whether Initiative 350 were otherwise constitutional, it could not be applied to the Seattle School District, in particular, since that district had committed past acts of *de jure* segregation. The district court ordered that the constitutionality of the initiative (*i.e.*, on its face or as applied generally) would be taken up first ("Phase I"). It further directed that "Phase II" of the proceedings, if necessary, would be addressed to whether or not Initiative 350 could constitutionally be applied in any given case.

Trial of the so-called "Phase I" issues was held in late April and early May, 1979. On June 15, 1979, the court entered findings of fact and conclusions of law accompanied by a memorandum opinion. (App. A) Entry of judgment was delayed pending disposition of requests for awards of attorneys' fees. On August 29, 1979, the district court entered its final declaratory judgment, stating, in part, as follows:

> 1. *Declaratory Judgment.* Initiative 350 is declared unconstitutional in that it denies equal protection of the laws to racial minorities in contravention of the Fourteenth Amendment to the United States Constitution in the following respects:
>
> (a) It creates an impermissible racial classification by forbidding mandatory student assignments for racial reasons while permitting such assignments for purposes unre-

lated to race. No compelling state interest justifies that racial classification.

(b) A racially discriminatory intent or purpose was one of the factors which motivated the adoption of the initiative.

(c) It is overly inclusive in that it prohibits a school district from implementing a mandatory student assignment program even though the school district may be under a constitutional duty to eliminate segregation. [CR 440.]

A Ninth Circuit panel majority affirmed the District Court, though on a limited basis, saying at 633 F.2d 1342-43:

> "We find it unnecessary to discuss the District Court's holding that Initiative 350 was motivated by a discriminatory purpose and is unconstitutionally overbroad because we conclude that the statute was correctly struck down as an impermissible legislative classification based on racial criteria. *Hunter v. Erickson,* * * * *Lee v. Nyquist,* * * *"

Mention should also be made at this point of a previous action commenced by the Seattle School District in December, 1975.[7] That litigation resulted, in 1977, in a major restructuring of the traditional relationship between the State and its public school districts by sharply increasing the level of state funding for the districts and virtually eliminating local school district autonomy.[8] See the discussion at pp 15, 16, *infra*.

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[7]See, *Seattle School District v. State,* 90 Wn.2d 476, 585 P.2d 71 (1978).

[8]See, Laws of 1977, 1st Ex. Sess. (Basic Education Act of 1977); chapter 325, Laws of 1977, 1st Ex. Sess. (Levy Limit Act); and §§ 94, 96 and 97, chapter 339, Laws of 1977, 1st Ex. Sess. (Budget Act.) These legislative changes were in response to the trial court's decision in 1977 (affirmed by the State Supreme Court the following year) holding that Article IX of the Washington State Constitution makes it the paramount duty of the state (and not local school districts) to provide for the basic education of Washington's children. The amount of funding each school district is to receive not only from State, but from local sources as well, is now controlled by the state legislature. The legislature effectively controls average salary levels, the amount of permissible salary increases for school staff and staff/student ratios. Further, course offerings, in terms

3. The Impact of Initiative 350:

The courts below subscribed to the notion that Initiative 350, if implemented on a statewide basis, would have severe and sweeping adverse impacts on the exercise of constitutional freedoms in the field of public education. In so doing, they ignored the initial, self-evident proposition that Initiative 350 would have no impact on anyone in particular in those 297 Washington school districts where few, if any, extra-neighborhood assignments are presently being made for any purpose.[9] Moreover, as to the three plaintiff school districts represented in this appeal, it remains impossible to define and articulate any measurable adverse impact which justifies the lower court's acquiescence in this contention.

A. *Pasco.*

The impact of Initiative 350 when implemented in the Pasco School District, for instance, will be entirely salutary. The initiative will effectively eliminate invidious racial discrimination which has occurred and which continues to occur in that district.

The Pasco School District now has a racially-discriminatory one-way bussing program which it implemented in 1965 by closing its one predominantly black elementary school and bussing unwilling minority students from the so-called East Pasco area of the district to other schools located far from this neighborhood. (Findings of Fact 4.1-4.5; Transcript pp. 601-03.) In this respect, the Pasco bussing program is no different from that found to constitute a violation of equal protection in *NAACP v.*

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of both content and number of hours for various grade levels, are legislatively mandated, as is also the number of hours the teacher must spend in the classroom.

[9]See, Exhibit A-53; Exhibit A-93; Exhibit A-96. Many of these school districts have only one school facility serving students at a given grade level. Exhibit A-93. In fact, however, several larger school districts with minority populations in excess of the state-wide average have racially-balanced their schools through application of the traditional neighborhood school assignment policy. These districts would not be impacted by Initiative 350. See, Exhibit A-93(g) for school-by-school minority enrollments in the following school districts: Prosser, Grandview, Sunnyside, Toppenish, Wapato, Moses Lake, Quincy, Othello and Clover Park.

Lansing, 559 F.2d 1042, 1052 (6th Cir., 1977). But Initiative 350 would put an immediate stop to this discriminatory program by implementing its central neighborhood school assignment policy on behalf of *all* students and their parents—majority and minority—in the Pasco School District.

B. *Tacoma.*

In one sense, at least, the posture of the Tacoma School District here is like that of the Pasco School District—in that the reason for its presence at all in the litigation remains somewhat mysterious.

The Tacoma School District has no mandatory bussing. Instead, it operates a highly successful voluntary "magnet school" program by which it maintains racial balance in its schools. (Findings of Fact 5.1-5.16.) Though the district has contended half-heartedly during the course of this litigation that Initiative 350 will adversely impact its magnet school program it has never countered the State's responsive argument that Initiative 350 does not (and was never intended to) interfere with the program in Tacoma. The District Court nevertheless concluded, without analysis or explanation, that Initiative 350 would have some sort of adverse impact on the Tacoma program. (See, Finding of Fact 10.1.) The Ninth Circuit panel never reached the issue.

C. *Seattle.*

Only in the Seattle School District does Initiative 350 inhibit a local school district program to cure perceived racial imbalance in public schools. The evidence in this case suggests strongly, though, that minority parents in Seattle regard racially-oriented mandatory bussing as an intolerable burden. When viewed in this light, Initiative 350 has a racially benign impact. See, discussion at pp 18, 19, *infra*.

4. Record Identification of the Questions Presented.

Questions I through IV, and Question VI were effectively raised to the District Court in written briefs and oral argument at the time of hearing on Plaintiffs' Motion for Preliminary Injunction (February 9, 1979) and then

again at the time of trial (April 23-30, 1979; May 1, 10-11, 1979) and ensuing final argument (June 15, 1979). The District Court's disposition is reflected in its Findings, Conclusions and Memorandum Opinion (Appendix A).

Questions V and VII, first formally raised on appeal to the Ninth Circuit in Appellants' opening brief dated November 20, 1979, are based upon contentions of the State raised throughout the District Court proceedings. Though raised again on appeal, Questions I, II, IV, V, VI and VII were never reached by the Ninth Circuit, which effectively answered Question III affirmatively and found it unnecessary to deal with the other questions presented. See 633 F.2d at 1342-43.

Question VIII was first effectively raised by the petitions for award of attorneys' fees filed by respondents (plaintiffs below), which were denied by the District Court. The cross-appeals from that denial were disposed of in the manner shown at 633 F.2d at pp 1347-50.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. Whether a Neighborhood School Policy May Be Restored, By Either the Legislative Authority of the State or By the School District Itself, Without Violation of the Fourteenth Amendment is a Significant Issue of Nationwide Importance. (Questions I-V.)

The State of Washington has operated a unitary public school system since territorial days—a system in which not one of its 300 local school districts has ever been found by any court to have committed a single act of intentional racial discrimination in the operation of its schools.[10] Yet the state has now been held to be constitutionally prohibited from statutorily formalizing its traditional, racially-neutral, neighborhood school assignment policy. A majority of the judges in the courts below so held, focusing upon the central fact that Washington's

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[10]In one instance, however, a finding of such discrimination appears to be warranted. See our discussion of Pasco School District, p. 8, *supra*.

largest school district, though under no constitutional duty to do so, has undertaken to achieve wider racial distribution of its students by using a forced bussing program which is inconsistent with the historical state policy in favor of neighborhood school assignment.

It is this traditional policy, legislatively reaffirmed through the passage of Initiative 350 by a substantial majority of voters in that district as well as by a majority of voters all across the state, which has been frustrated by the decisions rendered below.

The fundamental legal basis for this appeal is that, in so holding, the District Court and two members of a three-judge panel of the Court of Appeals have utterly disregarded the now well-established rule that state action—including enactment of a statute—may only be held violative of the Fourteenth Amendment to the United States Constitution when those challenging it have proven that it was motivated by an intent and purpose to discriminate on forbidden grounds. *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

For the courts below, however, the fact that Initiative 350 was prompted by adoption of the Seattle Plan, and would effectively rescind a major part of that plan, was sufficient to invalidate the initiative. As stated by the Court of Appeals:

> "We note at the outset the operative legal and political effect of Initiative 350. As the District Court below said, the statute 'was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments.' 473 F. Supp. at 1015" 633 F.2d at 1343.

The legal theory adopted by the courts below will be examined shortly. Our purpose here is to show its important consequences.

Let us assume that the board of the Seattle School District were itself to decide to eliminate the Seattle Plan.

Would that action automatically be a violation of the Fourteenth Amendment? *Dayton Board of Education v. Brinkman*, 433 U.S. 40 (1977) certainly indicates that it would not. See p. i, *supra*.[11]

But *why* not? The decision to adopt the plan in the first place—though not constitutionally required—was certainly taken with full consciousness that racial matters were involved.[12] And the same must be equally true of *any* decision to eliminate the plan. Indeed, it would also be true of any decision to curtail any "affirmative action" program, whether it involves employment practices, admissions' policies to universities, or minority contractor preferences.

If the local board may *not* eliminate such a plan, and if the plan is therefor to be forever locked into place, it is important to have this Court state why and how the Fourteenth Amendment requires that result, contrary to the suggestion in *Dayton*.

If, on the other hand, the local board may eliminate such a plan it is equally important to find out why the Fourteenth Amendment prohibits the superior legislative authority of the State, itself, from achieving the same result.

To look at the matter from a slightly different perspective: One of the most important social and political issues in this nation today is that of mandatory bussing to achieve racial balance. Some even question whether it should be utilized as a remedy for *de jure* segregation—though the Washington voters, in adopting Initiative 350, certainly did not question that.[13]

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[11]As *Washington, Arlington Heights* and *Feeney* show, motivation and intent are critical. If the school district eliminated the plan simply because majority parents did not want their children in the same classrooms as minority children, and prevailed upon the board to accede to their wishes, the elimination of the plan would be constitutionally impermissible, under those decisions.

[12]The intervenor-plaintiffs, of course, claim that the district has committed acts of de jure segregation. The District Court has accordingly bifurcated this case, in order to hear that claim in a subsequent phase. See, page 6, *supra*. As we have already noted, however, Initiative 350 does not prevent *constitutionally required* bussing. See, page 4, *supra*.

Yet, the lower courts have effectively put this entire issue of bussing to achieve racial balance outside the scope of permissible action by the voters—even when no *de jure* segregation is involved in the first place. The voters can debate the issue all they wish; but neither they nor their elected representatives can decide it. According to the lower court decisions, the Fourteenth Amendment has taken this power from them.[14]

We next briefly review how the lower courts arrived at this astonishing result.

A. *The Holding of The Court of Appeals that Initiative 350 Creates a Racial Classification, Thereby Obviating Any Inquiry Into Intent, Represents a Shift in Equal Protection Analyis Which Should be Reviewed by this Court.*

Both the District Court and the Court of Appeals concluded that Initiative 350 was unconstitutional under *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y., 1970), aff'd 402 U.S. 935 (1971). Those decisions struck down explicit racial classifications (though expressed in neutral terms) contained in state legislation. Here, however, the courts below applied a loose, process-of-elimination analysis to reach the

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[13]Initiative 350 unquestionably embodies, however, a profound skepticism about the net benefits to be gained from any generalized mandatory bussing program, such as Seattle's, when that program is constitutionally unnecessary. For the initiative allows such bussing only when it can be justified on the basis of (1) the specific educational needs of a specific student; (2) specific health or safety hazards or physical barriers between a student's home and his neighborhood school; or (3) physical deficiencies in that neighborhood school. See, § 1(1)-(3), quoted at page 3, *supra*.

[14]In California, however, the voters still have this power of decision. They exercised it in the November, 1979 general election by adopting Proposition 1, a constitutional amendment which prohibited state courts from ordering mandatory bussing for racial balance, except when required by the Fourteenth Amendment. See *Crawford v. Board of Education of the City of Los Angeles*, 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980), review denied by California Supreme Court, March 11, 1981, upholding the validity of Proposition 1 against a Fourteenth Amendment challenge essentially the same as that presented in this case. As a result, the mandatory bussing program in Los Angeles has been dismantled, while that in Seattle remains constitutionally locked in.

conclusion that *Hunter* and *Lee* are controlling. The Court of Appeals stated its approach succinctly at 633 F.2d 1342-43:

> "We find it unnecessary to discuss the District Court's holding that Initiative 350 was motivated by a discriminatory purpose * * * We conclude that the statute was correctly struck down as an impermissible legislative classification based on racial criteria. *Hunter v. Erickson*, * * * *Lee v. Nyquist*, * * *"

We agree with the District Court that

> "* * * [a] although the initiative does not explicitly disallow student assignment for racial reasons, as did the New York statute considered in *Lee v. Nyquist*, it achieves the same purpose by enumerating those purposes for which there may be student assignment and omitting from that enumeration the assignment of students in order to achieve racial balance. * * *"

How this basic approach—finding a racial classification in a statute which makes no reference to race—amounts to a major shift in equal protection analysis is shown by the dissenting opinion:

> "In its recent decisions, the Supreme Court has emphasized that the touchstone of an equal protection violation is an *intent to discriminate*, i.e., an intent to treat similarly situated persons differently." 633 F.2d 1351. (Emphasis supplied)

That opinion then shows how this "touchstone" has been established and applied in *Washington*, *Arlington Heights* and in recent school desegregation cases such as *Dayton* and *Columbus Board of Education v. Penick*, 433 U.S. 449 (1979).

The dissent then continues:

> "The inquiry into intent can be avoided only if the challenged statute contains an explicit suspect classification: * * * [quoting from *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979)]" 633 F.2d at 1351.

And finally, the opinion pinpoints the fundamental

error in the majority's approach:

> "The laborious inquiry into intent, see *Columbus* and *Dayton, supra*, could be avoided under the majority's analysis by simply finding an explicit racial classification any time a school district bused students for special education or other reasons, while refusing to do so to desegregate its schools." 633 F.2d at 1352.

And again,

> "The difficulty with the majority's analysis, supported in part by dictum in *Lee v. Nyquist*, * * * is that it confuses treatment of racial problems with treatment on the basis of race. The latter, of course, is suspect. But 'racial' problems, such as school desegregation, must be dealt with in terms of the specific problem and specific solutions. The state does not create a classification on the basis of race in so doing." 633 F.2d at 1353.

That a statute does not create a racial classification does not, of course, automatically save it from constitutional challenge; it simply means that the issue of discriminatory intent must be examined and resolved.

Two final points on this question. *Lee* and *Hunter* are applications of the basic principle that a governmental body may not "stack the political deck" against a minority in attaining adoption of laws that are in its interest. And the majority below obviously thought that Initiative 350 had done exactly that, by improperly removing the issue of mandatory bussing for racial balance from the hands of the local school boards. See, 633 F.2d at 1345-46.

As the dissenting opinion points out, however, that is simply not the case. Under Article IX, § 1 of the Washington Constitution, as applied in *Seattle School District v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), it is the *state* which has the responsibility "for organization, administration and operational details of elementary and secondary education." 633 F.2d at 1353. And the state has fully met that responsibility, and thereby eliminated any significant autonomy of local school boards. See, page 7, *supra*.

Under Initiative 350 the proponents of mandatory bussing must convince either the state legislature or the

voters of their cause. But in this, they are in no different situation from the proponents of any other significant proposal affecting the operation of public schools in the State of Washington.

Secondly, the approach taken by the Court of Appeals is strikingly similar to that taken by the three-judge District Court in *Valtierra v. Housing Authority of San Jose*, 313 F.Supp. 1 (1970), in which the District Court struck down an amendment to the California Constitution providing that no low rent housing projects could be developed unless the project was approved by the voters of the community. The District Court stated:

> In addition to asserting that Article XXXIV denies equal protection of the laws to persons who are poor, the [plaintiffs in the companion case] assert that it also denies equal protection to those who are Negro. Although Article XXXIV does not specifically require a referendum for low-income projects which will be predominantly occupied by Negroes or other minority groups, the equal protection clause is violated if a "special burden" is placed on those groups by the operation of the challenged provision, if "the reality is that the law's impact falls on the minority." Hunter v. Erickson, *supra*, 393 U.S. at 391. * * *
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> * * * *
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> Here, as in the *Hunter* case, the "special burden" of a referendum is not ordinarily required; here, as in the *Hunter* case, the impact of the law falls upon minorities. The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. 313 F.Supp. at 4-5.

In reversing the judgment of the three-judge court this Court said, in *James v. Valtierra*, 402 U.S. 137, 140-41 (1971):

> The court below erred in relying on Hunter to invalidate Article XXXIV. Unlike the case before us, Hunter rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on racial minorities within the governmental

process." Id. * * * *

> Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." * * * * The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. * * * * The present case could be affirmed only by extending Hunter, and this we decline to do.

Like the district court in *Valtierra*, the lower courts in this case have examined a statute which was racially neutral on its face and determined that a racial classification was necessarily implied. They then presumed that this implied classification was constitutionally invalid, and ended the analysis right there. No consideration of intent was needed. By extending *Hunter* and avoiding the required inquiry into intent, the lower courts have effected a major shift in equal protection analysis.

Under the *Washington* line of cases, however, the proper analysis is to determine whether such a racially-neutral statute, though it affects racial minorities, was adopted with a discriminatory intent.

We turn next to what should have been, but was not, the most important question for the Court of Appeals—the question of intent.

B. *The Definition of the Proper Criteria for Determining Illicit Discriminatory Intent in an Initiative or Referendum Approved by the Voters of a State Presents an Important Question Which Should be Resolved by This Court.*

The District Court, unlike the Court of Appeals, did inquire into intent—barely. It declined, for example, to delve into the subjective intent of the voters on the basis that "* * * the secret ballot raises an inpenetrable barrier." 437 F.Supp. at 1014. And thus did the secrecy of the ballot box make the whole balloting process a worthless exercise; for the State was thereby precluded from showing the validity of what the voters adopted.

The admitted evidence which was thus categorically excluded from consideration included several studies and public opinion surveys. One of these, a nationwide survey of racial attitudes, conducted by the Lou Harris Organization, demonstrates a genuine lack of segregative intent by members of the white majority—an attitude particularly strong in the American West—coupled with sincere opposition to mandatory assignment of public school students to achieve racial balance. (Exhibit A-133, pp. 13-14, 42, 43.) The same study shows that, on a nationwide basis, a plurality of black Americans now oppose mandatory bussing as a desegregation remedy. (Exhibit A-133, page 37.)

On the other hand, local school district studies placed into evidence indicated that over 70 percent of Seattle residents polled actually expressed a preference for living in multi-racial neighborhoods. (Exhibit A-97.) And again, the most widely read newspaper in the state, the Seattle Times, informed the electorate in early 1978 that, according to its own poll, roughly two-thirds of minority parents and guardians opposed imposition of mandatory bussing for the purpose of alleviating racial imbalance in schools. (Exhibit A-127.) News articles which appeared in both major daily newspapers in the city of Spokane, Washington's second largest city, just prior to the 1978 General Election contained reports of parental opposition to "bussing" entirely unrelated to race. (Exhibit A-130.) Advertising and public relations witnesses called by both sides gave unrebutted substantive testimony that a statewide campaign in favor of a ballot proposition would lose support in Washington if designed to appeal to segregative and racist attitudes. (Tr., pp. 496-98, 505-06, 509-11, 538; Ex. 2.)

Principal witnesses on behalf of all three plaintiff school districts acknowledged that a vast majority of parents—both minority and majority parents—in those districts expressed preference for retention of the time-honored neighborhood school assignment policy. (Tr., pp. 145-57, 391, 601-02, 605, 634-38.) All of this evidence was apparently ignored by the District Court which, instead, resorted to an *ipso facto* analysis to reach its conclusion that a segregative purpose must have motivated the passage

of Initiative 350, keying upon the singular proposition that the measure was adopted in direct response to implementation of the Seattle School District's bussing program. 437 F.Supp. 1014-16.

By categorically excluding such evidence (and more) from consideration, the District Court effectively refused to consider the State's factual defense that passage of Initiative 350 was *not* motivated by an intent to discriminate on racial grounds.[15] It is difficult enough for any defendant to prove a negative proposition; but that task was rendered flatly impossible here when the District Court refused to face the necessary task described in *Dayton Board of Education v. Brinkman, supra,* at 433 U.S. 414:

> "We realize, of course, that the task of fact finding in a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit. Findings as to the motivations of multi-membered public bodies are of necessity difficult, *cf. Arlington Heights v. Metropolitan Housing Development Corp.*, * * *"

Initiative 350 is not the first law adopted by the voters of a state or political subdivision which has racial implications. Nor will it be the last. The question of the proper evidence for determining the voters' intent is important and merits review by this Court.

II. Because Initiative 350 Reflects the National Neighborhood School Policy Adopted By Congress, the Lower Courts' Decisions Here Must Be Reconciled With Other Circuit Court Decisions Which Validate That Congressional Policy. (Questions VI, VII)

Initiative 350 is patterned very closely after certain provisions of federal law—the Equal Educational Opportunities Act of 1974 (codified as 20 U.S.C. § 1701, *et seq.*). See, Finding of Fact 7.6 473 F. Supp. 1008. The basic policy of that act is as follows:

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[15]Space considerations prevent us from fully reviewing here all of the evidence proffered on this issue. See, however, State Defendant's Proposed Findings of Fact and Conclusions of Law (Pleading No. 378, according to the Clerk's Record.)

Congressional declarations of policy.

(a) "1701 The Congress declares it to be the policy of the United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments."

Congress has reinforced this substantive expression of national policy by expressly limiting the geographical extent of any federally-ordered busing of school children to precisely the same geographical extent as does Initiative 350:

"1714. * * *

(a) No court, department, or agency of the United States shall * * * order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student."

Although the foregoing statute has been scrutinized on a number of occasions, it remains intact as an expression of congressional policy in favor of a nationwide neighborhood school policy and a substantive limitation on federal administrative involvement in busing for desgregation purposes. See, *e.g.*, *Hart v. Community School Board*, 512 F.2d 37 (2d Cir. 1975), *Morales v. Shannon*, 516 F.2d 411 (5th Cir. 1975), cert. den., 96 S.Ct. 566, 423 U.S. 1034, 46 L.Ed.2d 408; *Brinkman v. Gilligan*, 518 F.2d 853 (6th Cir. 1975), cert. den., 423 U.S. 1000; *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980).

The incongruity in according different judicial treatment to these two parallel legislative efforts—one state and one federal—raises an obvious and substantial federal question. For if Congress may enact legislation of this type without violating the due process clause of the Fifth Amendment to the United States Constitution, how can it be said that the State of Washington violates the Equal

Protection Clause of the Fourteenth Amendment by seeking to achieve the same goal by using the same statutory formula? *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Hills v. Gautreaux*, 425 U.S. 284 (1976).

The treatment accorded this federal statute by the federal courts differs from the treatment accorded Initiative 350 in one other respect, as well. The District Court held the initiative to be overbroad, on the ground that it would prohibit a school district from eliminating even *de jure* segregation, if the district thought it existed, though a court had not yet so ruled that it existed. See 473 F.Supp. at 1016.

Not only did that analysis of the District Court conflict with the legislative history of Initiative 350 (see, *e.g.*, Exhibit 39, Appendix 65) and the official interpretation of it by those state officials charged with implementing the measure, it also failed to account for the long-familiar rule that legislation will, if at all possible, be interpreted as restricted in scope if such an interpretation will preserve its constitutionality, even in the absence of language expressly so limiting the statute's impact. *United States v. Raines*, 362 U.S. 17 (1960); *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963).

Even more importantly, the District Court's treatment of this issue is inconsistent with the treatment accorded the Equal Educational Opportunities Act of 1974 (20 U.S.C. § 1701 et seq.) by the federal courts. See, *e.g.*, the treatment of 20 U.S.C. § 1702(b) in *Brinkman v. Gilligan*, 518 F.2d 853 (1975), cert. den. 423 U.S. 1000 (1975) and *Morgan v. Kerrigan*, 530 F.2d 401 (1976), cert. den. 426 U.S. 935 (1976).

III. The Ninth Circuit Panel's Reversal of the District Court's Denial of Attorney's Fees Raises Substantial Questions About the Limits to Which the Civil Rights Attorneys' Fees Statutes May Be Applied. (Question VIII)

The Court of Appeals concluded that the trial court had abused its discretion in refusing to award attorneys' fees to the school districts. In fact, the panel majority actually substituted its discretion for that of the District

Court and concluded that it was unreasonable *not* to award fees to a school district created, controlled, and funded by the defendant.

We will here note briefly the legal, factual and policy reasons why the Court of Appeals erred, and why this question requires plenary consideration by this Court.

(a) **Factual:**

The trial court recognized that this litigation had already been, and continues to be, largely funded by money appropriated for the school districts by the defendant state for purposes which include the conduct of this litigation. The Court of Appeals, however, concluded that refusing to require the state to reimburse the school districts for their expenditure of *State* funds, enabling them to sue the *state*, was an abuse of discretion! Is "double dipping" to be encouraged as a matter of fundamental national policy? Did Congress *intend* that result? Is that result necessary in order to encourage enforcement of the civil rights laws?

(b) **Legal:**

By awarding fees to the school districts, the Court below has, in effect, appropriated funds from the state treasury in favor of a municipal corporation of the state, created, funded and controlled by the state, and deriving its existence and authority entirely from state law. It has, inescapably, made a decision with respect to the appropriate funding of state programs and the establishment of state legislative priorities.

The Court of Appeals cited no authority for the proposition that municipal corporations—as creatures of statute—are even with the ambit of 42 U.S.C. 1988 or 20 U.S.C. 3205 so that they may, in this manner, demand additional public funds to replace those already furnished to them by the state legislature. Whether Congress ever intended, or even envisioned, such a result is extremely doubtful. In connection with the passage of 42 U.S.C. § 1988, for example, the Senate Report which accompanied the bill stated, in part, as follows:

"All of the civil rights laws depend heavily upon

> *private* enforcement, and fee awards have proved an essential remedy if *private citizens* are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain. In many cases arising under our civil rights laws, *the citizen* who must sue to enforce the law has little or no money with which to hire a lawyer. If *private citizens* are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then *citizens* must have the opportunity to recover what it costs them to vindicate these rights in court." [1976 U.S. Code Cong. & Admin. News at page 5908.] [Emphasis supplied.]

The legislative policy in favor of subsidizing *private* litigants has uniformly been reaffirmed by the courts. The case most often cited in support of this general expression of Congressional policy is *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), decided before either of the statutes here involved was enacted.

The essence of this Court's reasoning was stated at 390 U.S. 402:

> "* * * If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, *to encourage individuals injured by racial discrimination* to seek judicial relief under Title II." (Emphasis supplied)

The so-called "private attorney general" rationale for awards of attorneys' fees makes no sense in the present context. The original plaintiffs here were school districts—political subdivisions of the state, the operations of which are entirely publicly funded—not private citizens acting as "private attorneys general." That term itself connotes belief on the part of the courts that, when matters are finally settled and it is the private plaintiffs who have prevailed, it is appropriate that the public treasury should be tapped to pay for litigation found to have been commenced in the public interest. But that is precisely

what has happened here already. The language in the foregoing excerpts expressing concern about the "cost of private enforcement" has no application whatsoever in the situation where, as here, state-funded municipal corporations themselves seek the relief.

To summarize then, it seems amply clear that the Congressional purpose in enacting the various civil rights attorneys' fees statutes would not at all be served by allowing the school districts to replenish public funds already given them by the state for this very purpose.

C. **Policy:**

If Court of Appeals view prevails, it may well be counterproductive. States are today facing what can honestly be described as a fiscal crisis. The courts cannot fail to recognize this reality. Intense competition exists among worthwhile and important public programs for the use of increasingly scarce public dollars. The result of awards such as that of the Court below in this case may indeed be the withdrawal by the states of "legal services" funds from their subordinate public bodies and *other* publicly funded agencies; such as legal services organizations. To avoid the fiscal drain of "double dipping," state legislatures may choose to require those heretofore state-funded agencies to support their legal services efforts entirely—or at least in significant part—from other sources. The fundamental purpose of the civil rights attorneys' fee statutes will thus not be fostered, but rather inhibited. Is that sound public policy? Unless this Court notes probable jurisdiction and reverses, sound or not, policy it will be.

CONCLUSION

By failing to properly apply the decisions of this Court, the courts below have overridden the decision of the voters of the State of Washington on an important policy issue of national concern. The grounds on which they did so are also of national concern. Accordingly, this Court should note probable jurisdiction.

Dated this 16th day of June, 1981.

Respectfully submitted,

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